Petition

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No.

In the
Supreme Court of the United States
OCTOBER TERM, 1981

MARY ANN BALSLEY,
Petitioner,

vs.

HAZEL JEAN GULLEY
and
CONNECTICUT GENERAL LIFE INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. In reversing the District Court's summary judgment for the petitioner, did the Court of Appeals apply the laws of the State of Illinois as required by 28 U.S.C. 1652?

B. In reversing the District Court's summary judgment for the petitioner and directing that judgment be entered for respondent, where the only proceedings in the District Court had been the respondent's motion for summary judgment which was denied (and no appeal taken therefrom) and the petitioner's motion for summary judgment which was granted (and reversed in the instant appeal), did the Court of Appeals deny the petitioner of her constitutional right of "due process" by depriving her of a trial on the merits?

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Mary Ann Balsley hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit on appeal (January 11, 1982) and

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* The caption of the case contains the names of all parties.

its order denying the Petition for rehearing *in banc* (February 9, 1982) are reproduced as Appendices A and B respectively.

The memorandum of the United States District Court for the Northern District of Illinois, Eastern Division (February 6, 1981) granting Petitioner's motion for summary judgment and its judgment (March 12, 1981) and its previous memorandum (November 14, 1980) denying respondent's motion for summary judgment are reproduced as Appendices C, D and E respectively.

JURISDICTION

The order of the Court of Appeals denying the petitioner's petition for rehearing was entered on February 9, 1982, thereby letting stand its decision of January 11, 1982 reversing the District Court's grant of summary judgment for petitioner and directing that judgment be entered for respondent.

This Court has jurisdiction under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the U.S. Constitution

> No person shall . . . be deprived of . . . property, without due process of law.

28 U.S.C. 1652

> The laws of the several states . . . shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the Seventh Circuit reversing a decision of the District Court which

granted summary judgment in favor of the petitioner. The Seventh Circuit decision also directed that judgment be entered in favor of the respondent even though no trial on the merits had been held in the District Court.

On February 21, 1980, Connecticut General Life Insurance Company ("Connecticut General"), a Corporation of the State of Connecticut, filed an interpleader action in the District Court against the petitioner and the respondent, both citizens of the State of Illinois, to determine which of them was the rightful beneficiary of a $17,000 life insurance policy on the life of Julious Balsley ("Balsley") and issued through his employer. Initial jurisdiction of the District Court was under 28 U.S.C. 1332 (a)(1) Balsley had died on March 18, 1979. The petitioner was his wife and the respondent was his daughter.

The policy in question provided that:

> "A new beneficiary may be designated . . . by *filing a written request* therefor on a form satisfactory to the Insurance Company and signed by the Employee. *No change of Beneficiary will take effect until received* by the Insurance Company or (Employer). When, however, the change has been received, whether the Employee is then living or not, it will take effect as of the date of execution . . ." (Emphasis added)

Connecticut General's complaint alleged, *inter alia*:

1. That after Balsley's death, the respondent notified Connecticut General by letter, that Balsley, prior to his death, had executed a change of beneficiary form (dated March 11, 1979) purporting to change the beneficiary from the petitioner (the named beneficiary) to the respondent.

2. That the change of beneficiary form was:

   a. Never submitted to Connecticut General prior to Balsley's death.

b. Dated one week prior to Balsley's death
c. On a form provided by a predecessor group insurer
d. Signed as a witness by a person Connecticut General had been unable to locate and identify.

Petitioner's answer to the complaint neither admitted nor denied the above allegations but demanded strict proof thereof. Her answer further stated that if, in fact, Balsley signed the change of beneficiary form, it was a breach of an agreement between Balsley and the petitioner, as husband and wife, to name each other beneficiary of life insurance policies, and that she had complied with the agreement.

After depositing the insurance proceeds with the court, Connecticut General was dismissed.

On May 12, 1980, the respondent filed a Request For Admission to the genuineness of: (a) the change of beneficiary form allegedly signed by Balsley; (b) the affidavit of the respondent which set forth that Balsley was of sound mind when he executed the form naming the respondent the new beneficiary, that it was signed in her presence and in the presence of a witness, and that Balsley had advised her 'he wanted her to be the recipient of such funds in the event of his death as he had provided otherwise for other family members'', and (c) the affidavit of the witness which set forth that she witnessed Balsley's signature to the change form, that he was of sound mind at the time of execution and that she knew Balsley prior to his execution of the form.

The petitioner answered the Request For Admission stating that she could neither admit nor deny the genuiness of the form or the affidavits because she had no

personal knowledge of their creation or execution and did not know the signature of the affiants.

On June 27, 1980, the respondent filed her motion for summary judgment, attaching thereto the change of beneficiary form and the above affidavits. The petitioner's answer to the motion for summary judgment opposing said motion stated: (1) that by virtue of the petitioner's answer to the interpleader complaint and her response to the Request For Admission, there was a genuine issue as to the authenticity of the alleged change of beneficiary form; and (2) that assuming its authenticity, for argument only, there was a legal question as to its effectiveness to change beneficiaries.

On November 14, 1980, the District Court denied the respondent's motion for summary judgment, finding there was a genuine issue of fact and further, that the respondent may not be entitled to a ruling in her favor. (Appendix D)

Subsequently, the petitioner deposed the respondent at which time she testified that: (1) After Balsley executed the change of beneficiary form he told her to keep the form and that he would return to get it and deliver it to his employer; (2) he did not return to get it and did not have any conversation with her as to its disposition even though they spoke by telephone one week later, on the day of his death by heart attack; and (3) two days after his death she mailed a copy of the change of beneficiary form to Balsley's employer.

On December 12, 1980, the petitioner filed her motion for summary judgment setting forth the above deposition testimony of the respondent and attaching her (the peti-

tioner) affidavit which set forth that Balsley was of sound mind and in good health on the date of the alleged execution of the change of beneficiary form; that he went to work every day for the next five days after its alleged execution: and that he suffered a fatal heart attack seven days after its alleged execution.

The respondent's answer to the petitioner's motion for summary judgment re-alleged the matters that had been previously set forth in her motion for summary judgment. Her answer, however, did not deny her deposition testimony.

On February 6, 1981, the District Court sustained the petitioner's motion for summary judgment (Appendix C) and entered judgment in her favor on March 12, 1981 (Appendix D).

On January 11, 1981, on the respondent's appeal the Court of Appeal reversed the district court and directing that judgment be entered in favor of the respondent.

REASONS FOR ALLOWING THE WRIT

A.

28 U.S.C. 1652 has been interpreted to require the federal courts, in diversity of citizenship cases such as the one at bar, to apply the state law. *Eric R. Co.* v. *Tompkins,* 304 U.S. 64 (1934); *Prudential Ins. Co. of America* v. *Moore,* 145 F 2d 580, 583 (7th Cir. 1944), cert. denied 324 U.S. 849 (1945). If the Court of Appeals did not follow the court decision's of the state of Illinois regarding the effectiveness of the change of beneficiary, then it failed to abide by 28 U.S.C. 1652 and therefore "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision." Sup Ct. Rule 17.

It is quite clear from the Court of Appeals opinion that it relied on the decisions of the following Illinois cases: *Continental Assurance Co.* v. *Platke,* 295 F 2d 571 (7th Cir. 1961); *John Hancock Mutual Life Ins. Co.* v. *Douglass,* 156 F 2d 367 (7th Cir 1946); *Prudential Ins. Co. of America* v. *Moore,* 145 F 2d 580 (7th Cir. 1944) cert. denied, 324 U.S. 849 (1945). These cases generally deal with a situation where the policy provides for the change of beneficiary to be filed and acknowledged by the insurance company or endorsed on the policy and the *insured has mailed or tendered the change form but dies before the company receives same or acknowledges receipt or makes the necessary endorsement in the policy.* In such a situation, these decisions held that there was "substantial compliance" with the provisions of the policy and the change of beneficiary was effective.

However, a close analysis of these cases will show that even though their holdings are sound, they do not apply to the facts of the instant case and are, therefore, not authority for the Court of Appeal's ruling.

In *Platke*, the designated and proposed beneficiaries were both claiming the proceeds. The policy provided for the change to take effect upon endorsement on the policy by the company. When the *insured sent* the change form to the company without the policy, he attached an affidavit which stated that he "requests that the change of beneficiary be effected without endorsement on the policy." At the time the insured sent in the change form he was living in St. Louis with one of the proposed beneficiaries and the policy in question was in the possession of the "old" beneficiary who was living in Chicago. The company acknowledged to the insured in writing that the change form and affidavit had been received and would be kept "for whatever legal value they may have."

In holding that the change was effective, the court stated at Pages 572-573:

> ". . . It is clear that the insured intended to effectuate the change and under the circumstances disclosed by the record *it appears he did all that he could have been reasonably expected to do to accomplish his desire. There is nothing in the . . . facts which is persuasive that the insured could have done more.* (Emphasis added)
> " . . . the policy endorsement provision is for the protection of the company."

In *Douglas* the policy provided that the beneficiary change form was to be "filed at its Home Office, but change shall take effect only upon endorsement hereon." The insured, prior to his death, *tendered to the company's*

agent at the local office a change of beneficiary form substituting his present wife for his ex-wife, from whom he had been divorced for six years. The agent rejected the form because it was not properly prepared and the agent prepared new forms for the insured's execution. The insured did not get an opportunity to execute them because he was involved in an accident and died within a few days.

In reversing the lower court's ruling in favor of the "old" beneficiary, the court held at pages 369-370:

> "The law appears to be fully established that a change of beneficiary may be accomplished *without strict or complete compliance with the condition of the policy regarding the endorsement of the insurer* and that such endorsement by an insurer is purely a ministerial act which the company cannot refuse to perform, and *a failure on its part to perform such act will not defeat the change if the insured has done everything within his power to effect a change.* (Emphasis added)
>
> *"The request for change was made by the insured . . . and tendered . . . for whatever action may be necessary on the part of the insurer . . .*
>
> "Under these circumstances we think there is sufficient positive action on the part of the insured to manifest his intention to make the change which he then carried into effect by written request on the blank of the insurer which was then *tendered* to the insurer. (Emphasis added)

In *Moore,* the insurance coverage was provided through the insured's employer. The policy provided that the insured could change the beneficiary:

> ". . . by notifying the company through the Employer. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such

> person insured and all rights of his or her former Beneficiary or Beneficiaries shall thereupon cease."

The insured's wife had originally been named beneficiary. Four days after the wife shot the insured, he, with the assistance of a representative of his employer, prepared and *sent* the necessary change form naming his mother, along with the policy, to the company. Upon receipt of the form and policy, the company made a certificate noting the change of beneficiary but kept the certificate and policy in its files. The certificate of change was dated five days after the insured sent in the form. However, the insured had died of the gunshot wounds the day before the company executed the certificate of change and therefore no "due acknowledgment" of change was "furnished by the company to such insured", as provided in the policy.

In holding in favor of the "new" beneficiary, the court stated at pages 581-582:

> "The proof fails to show *the company acknowledged, to the insured,* the change of the beneficiary.
>
> "The most that can be said from the record before us, is that the insurance company, without knowledge of the death of the insured, attached acknowledgments of the change in beneficiaries, to each policy and retained both policies and acknowledgments.
>
> . . .
>
> "*A change of beneficiary may be accomplished without strict or complete compliance with the conditions of the policy regarding the endorsement of the insurer.* The endorsement . . . is purely a ministerial act which the company cannot refuse to perform and *a failure on its part to perform such act will not defeat the change, if the insured has done everything within his power to effect a change.*" (Emphasis added)

The above authorities stand for the legal proposition *that if the insured, during his lifetime, has done all that he can reasonably do* to strictly comply with all of the provisions of the policy relating to a change of beneficiaries, considering any unusual circumstances that prevented full and complete compliance, and the *company fails* to strictly *comply* to the provisions relating to endorsement on the policy during the insured's lifetime, *then* the court will effect the change applying the theory of "substantial compliance", since the endorsement provision is solely for benefit of the company and *its* failure to comply should not negate or thwart the *previous compliance and intentions* of the insured.

The Court of Appeals erred in applying the "substantial compliance" theory to the facts of the case at bar because it was the insured *Palsley* and *not the company,* who failed to comply, and such application is not the law of the State of Illinois.

There are numerous decisions in Illinois that *do* apply to the facts of the instant case and these decisions hold that when the insured *does not do all that is reasonable to comply* with the provisions relating to the change of beneficiary, no change is effected.

In *Seipel* v. *State Employees' Retirement System,* 8 Ill App 3d 182, 289 N.E. 2d 288 (1972), the insured died, leaving the executed designation of beneficiary form in his desk drawer. The insured had previously submitted an improperly executed form to the system which the system had rejected and returned. After the insured's death a co-worker found the form and sent it to the retirement system. The court held there had not been an effective designation of beneficiary, stating at 8 Ill App 3d 182, 184-185:

". . . In Illinois, in life insurance contract beneficiary cases, the Court has held that a substantial compliance with the policy requirements must have been followed. Thus, in *Begley* v. *Miller* (1907) 137 Ill. App. 278 . . . substantial compliance with the life policy requirements were deemed essential.

". . . *Intention alone should not govern, as such a rule might well result in the application of unmanifested acts and be based upon unfounded assumptions actually not justified. There is no presumption as to the deceased member's intention at the date of his death.* (Emphasis added)

"The decision and finding of the administrative body is not against the manifest weight of the evidence, nor is it contrary to law. *Rather, the decision is in accord with the evidence and the law.*" (Emphasis added)

Even though *Seipel* dealt with a retirement fund, it, by its very words, applied to life insurance contract cases, and its holding was in fact applied to a life insurance contract in the case of *Tatelman* v. *Tatelman,* 25 Ill App 3d 678, 323 N.E. 2d 821 (1975) cert. denied.

In *Begley,* cited above in *Speipel,* the insured did not send in the policy with his request for change of beneficiary and the court *held* he had not done all he could do to effect the change of beneficiaries.

In *Williams* v. *Teachers Insurance & Annuity Assn.,* 15 Ill App 3d 542, 304 N.E. 2d 656 (1973) the insured signed a change of beneficiary form and gave it to the "new" beneficiary but it was never sent to the insurance company during his lifetime. The court at 15 Ill App 3d 542, pages 548-549 stated:

"With respect to the insurance policy with a beneficiary clause which can be changed, there are two

instances where title vests. Initially, title is vested in the insured when the policy is procured; *another vesting occurs upon the death of the insured when the beneficiary becomes entitled to the proceeds. . .* (Emphasis added)

". . . The most he is supposed to have said, according to the plaintiff, was that 'he had changed his beneficiary, policy he had changed everything to me and the kids.' His lack of any affirmative action to change the beneficiary was not offset by his ambiguous expression that a change had been made. *"Generally, when a policy of insurance states the method by which a change of beneficiary can be made, the prescribed mode is exclusive; a change by any other method is ineffectual. (Citation) Williams' policy required written notice to the insurer . . . Williams neither followed the mandate of the policy nor did anything else (Citations) to effectuate a change in the beneficiary clause. On oral declaration that a beneficiary has been changed or will be changed is not sufficient to effect the change. (Citations)"* (*Emphasis added*)

In *Williams,* the insured executed the change form, showed it to the proposed beneficiary and told her she was going to be the beneficiary, but he did not follow through by sending it to the company. *That is exactly what Balsley did in the case at bar.*

Also, in *Williams,* the rights of the named beneficiary "vested" at the death of the insured and even though the "equities" were with the proposed beneficiary, the court ""regretfully" ruled in favor of the named beneficiary. (15 Ill App 3d 542, 547)

In *Logan* v. *State Farm Life Ins. Co.,* 6 Ill App 3d 770, 378 N.E. 2d 295 (1978) the sister of the insured signed the insured's name to the change form and re-

turned it to the agent who had prepared the form at the direction of the insured. The court held that the sister had no authority to sign the form on behalf of the insured (and presumably no authority to send it back to the agent, even though the court did not have to address that question). The court in affirming for the named beneficiary held at page 773, 6 Ill App 36, 770:

> ". . . Moreover, from the time the insured expressed his intent to change the beneficiaries and the agent mailed the form to the insured, he could have decided not to change beneficiaries . . . *Therefore, the (new beneficiary) does not prove that (the insured) did everything in his power to effectuate a change of beneficiary.*" (Emphasis added)

The Illinois Supreme Court in *Young* v. *American Standard Life Ins. Co.*, 398 Ill 565, 76 N.E. 2d 501 (1948) addressed the question of whether or not the insured had done all he could to effect a change of beneficiary. The *Young* case dealt with an insurance policy provided through a union. The policy provided for the request for change of beneficiary to be in writing, signed by the insured *and transmitted through the union to the insurance company, and the change would be effective upon receipt* by the company. On the day the insured died in Chicago, the insurance company in Washington D.C., received a change of beneficiary form, changing the beneficiary from the plaintiff to the defendant. The form ended with the words "it being understood that such change shall not become effective until endorsement has been made." The form had been mailed the preceeding day in Chicago, however, since the form was undated and did not state the defendant's (proposed beneficiary) relationship to the insured, the insurance company mailed the form to a union official requesting that he get the

form completed by the insured stating the relationship of the defendant and dating the form.

Seven days after the insured died, the insurance company again received the form with the word "fiance" written in for the relationship and dated "10/8, 1943". (This date was in fact 14 days prior to the insured's death, however, at the time the insurance company received the "corrected" form it did not know of the death of the insured.)

The Illinois Supreme Court, in reversing the appellate court, ruled in favor of the plaintiff (the "old beneficiary) and stated at 398 Ill 565, 569:

> "The insured had been dead at least three hours before the request in its original form reached the company. Consequently the endorsement on the policy was not and could not have been made during his lifetime. It never was made. By reason of the facts relative to (the policy) plaintiff was, and remained, the beneficiary therein. *The rights of a duly appointed beneficiary under a life insurance policy are fixed by the facts existing at the time of the death of the insured and the company can do nothing thereafter to change those rights.* (Citations) (Emphasis added)
>
> The defendant argues that where the insured has done all he could do to effect a change of beneficiary but dies before the change is formally made by the company, a court of equity will regard the change as effected. *Did the insured do all he could to effect a change of beneficiary? The request for such change when first received by the company bore no date. He could have inserted the date . . .*
>
> "*The relationship to the insured of . . . the proposed new beneficiary was not given. He could have stated the relationship . . .*

> "*It is not shown that the request was transmitted through the union. It could have been so transmitted . . .*
> "*The date and relationship could easily have been inserted on the request by the insured. No reason is assigned for their omission. Nor does it appear why the request was not transmitted through the union . . . We cannot hold, under all of the foregoing facts, that the insured had done all he could to effect a change in this certificate . . .*" (Emphasis added)

At Page 572, the court then reviewed the facts of *Moore*, supra, and *Douglass* supra, which had been relied upon by the defendant therein:

Regarding *Moore*, it stated: "The difference in that case and this one at bar is apparent."

Regarding *Douglass*, it stated: "The facts in that case are clearly distinguishable from those in the case at bar."

The court then ruled at page 574:

> "We are of the opinion that the insured had not done all that he could to effect a change of beneficiary . . . The change of beneficiary not having been effected at the insured's death, the right to the proceeds vested in the plaintiff . . ."

As set forth earlier herein, the insureds in both *Moore* and *Douglass* had done all they could do to effect the change and some unusual circumstances intervened *which prevented the company from complying* with the terms of the policy prior to their deaths. That is what made *Moore* and Douglass "apparently different" and "clearly distinguishable" and therefore not applicable to the facts of *Young*.

In *Young*, the insured could have put in a date, but did not; he could have put in the relationship of the proposed insured, but did not; and he could have transmitted the form through the union, but did not. These failures were fatal to the effectuation of a change of beneficiary. Balsley, in the case at bar, could have taken the form with him on March 11, 1979, for delivery or mailing (i.e. "filing"), but did not; he could have, on March 11, 1979, authorized the respondent to deliver or mail it on his behalf, but did not; or, after March 11, 1979, he could have returned to the respondents and retrieved the form for delivery or mailing or telephoned the respondent to authorize her to deliver or mail it, but did neither. Should not Balsley's failures be just as fatal as the failures in *Young*?

Further, in *Young*, the rights of the named beneficiary "vested" at the death of the insured (as they did in *Williams*, supra). Should not the same "vesting" occur in the instant case at the death of Balsley?

The Court of Appeals was obligated under 28 U.S.C. 1652 to follow the reasoning and decision of the *Young* case and not the decisions of *Moore* and *Douglass* or *Platke*, (see pages 3 & 5 of its Opinion, Appendix A) which holdings are not applicable to this factual situation.

The Court of Appeals also cites at page 4 of its Opinion (Appendix A) *Donahey* v. *Sweigart*, 366 Ill App 366, 88 N.E. 2d 170 (1949), as authority for its decision. *Donahey* is, in fact, authority for the petitioner's position that change of beneficiary had *not* been effectuated.

In *Donahey*, the insurance policy provided that the insured could change beneficiaries by "filing written notice

thereof", along with the policy, with the company and that the change "shall take effect upon endorsement" by the company. While in the hospital, the insured told the company's agent that he wanted to change his beneficiary from his ex-wife to his present wife and the agent told him he would see that the change would be made. Previously, the insured had told his present wife he was going to make her the beneficiary and, in fact, had made her the beneficiary of another policy, which policy had also previously named his ex-wife as beneficiary. The insured knew that a written request had to be made, however, the "evidence shows that no written request of the deceased (insured) was ever made for the change of beneficiary." 366 Ill App 366,370.

The present wife proceeded on a theory that the insured, during his lifetime had done "everything within his power that was requested of him to make and accomplish a change of beneficiary to the plaintiff, and that, therefore, in equity the change of beneficiary should be decreed." 366 Ill App 360, 369-370.

The court held at 366 Ill App 360, 371 that the insured:

> ". . . knew that one of those necessary steps was a written request for change by the insured. There is no evidence that the deceased was unable to write or at least make his mark on the afternoon the conversation was alleged to have taken place, and *there is no reason given why a written request for change of the beneficiary could not have been executed by the deceased on that day or the next . . .*" (Emphasis added)

In the case at bar, "there is no reason given why a written request for change of beneficiary could not have been "filed by Balsley on "that day (March 11, 1979) or the next."

Finally, the Appellate Court of Illinois, in *Dooley* v. *James A. Dooley Assoc. Emp. Retirement Plan*, 426 N.E. 2d 1028, (decided on September 11, 1981) addressed the question of what is "filing" in insurance policy cases. At page 1032, the court stated:

> "There is no dispute that the . . . Plan set forth two requirements to effect a beneficiary designation change; the change had to be in writing, and *it had to be filed* with the company.
>
> "Even assuming arguendo that the instrument was a sufficient writing as required under the Plan, *the second requirement to effect a change, that it be filed with the company, has not been met.*
>
> . . .
>
> ". . . The word 'file' has been defined as meaning to 'deliver' . . . to the proper officer for keeping . . . among the records of his office . . . It has been held that a document is considered filed when it is deposited with and passes into the exclusive control and custody of the clerk, who understandingly receives the same in order that it may become part of the permanent records of his office . . . with these definitions as guides, we consider whether the contested document was filed' . . .
>
> " . . . However, the mere fact that the contested letter came into his possession does not mean it had been 'filed' as we have seen that term commonly defined.
>
> ". . . *In a true sense, control and authority over this disputed document was never relinquished by decedent* . . .
>
> . . .
>
> "Accordingly, the trial court did not err in concluding that decedent did not effect a beneficiary change in 1978 and that therefore the 1973 beneficiary designation is valid and effective." (Emphasis added)

Under the *Dooley* definition of "filed", Balsley never filed the change of beneficiary form with his insurance company or employer, and therefore did not "substantially comply" with the terms of the policy prior to his death. In fact, the form still has not been "filed" since, even the Court of Appeals found that:

> ". . . None of the parties contend that Julious Balsley authorized Hazel Jean Gulley to send the form, or that he intended she do so. (Opinion, page 2, Appendix A)
>
> ". . . Although Hazel Jean Gulley mailed a copy of the Change of Beneficiary form to the employer, she did so on her own initiative and not at the direction of Julious Balsley. *Moreover, there were no unusual circumstances that prevented Julious Balsley from delivering the form to his employer as required by the policy.*" (Emphasis added) (Opinion, page 4, Appendix A)

It is axiomatic that an agent has only the authority granted by the principal and that the unauthorized act of the agent is a nullity. *Logan* v. *State Farm Life Ins. Co.*, 61 Ill App 3d 770, 378 N.E. 2d 395 (1978)

The District Court found on page 5 of its memorandum granting the petitioner's motion for summary judgment (Appendix C) that:

> ". . . The policy language on which Gulley relies, giving effect to a form *received* after the employee is dead, . . . cannot tenably be construed to allow a change of beneficiary form to be filed by an unauthorized third party. Especially in the absence of a clear intent to change the beneficiary, the court could not so distort the language of the policy to allow the construction advanced by Gulley . . ."

The above holding follows the law of Illinois and should have been affirmed by the Court of Appeals.

B.

In directing that judgment be entered in favor of the respondent, after reversing the summary judgment in favor of the petitioner, the Court of Appeals denied the petitioner due process by depriving her of a trial on the merits of this cause.

At pages 4 and 5 of the Opinion (Appendix A) the Court of Appeals found the following "facts" involved in this litigation.

> ". . . He (Balsley) obtained the correct change of beneficiary form, executed the form properly and in the presence of a witness, explained to his daughter and the witness why the change was made (i.e. 'that he wanted her to receive the proceeds of the policy in the event of his death, as he had otherwise provided for other family members.' page 2) . . .
> ". . . There is no hint of fraud or duress in the execution of the form. There is no indication that the decedent changed his mind during the week between execution of the form and his death . . . Balsley himself (did not think) the change was made in contemplation of death . . ."

Neither the existence nor non-existence of these "facts" has been established by a trial on the merits, with the right of cross-examination. Since there had been no trial, all of these "facts" were gleaned by the Court of Appeals from the allegations in the motions for summary judgment (or answer thereto) and the affidavits attached thereto. These "facts" (some of which may be inadmissible at trial as hearsay) are accepted as true only for

the purpose of the motions for summary judgment. *Nyhus* v. *Travel Management Corp.*, 266 F 2d 440 (1972)

The proper course for the Court of Appeals to follow once it ruled on the legal issue of "substantial compliance", was to find that there was a genuine issue of material fact, and remand the cause for a trial on the merits. This procedure was established in *Fountain* v. *Filson*, 336 U.S. 681 (1949) and repeatedly followed in other cases; *Byrd* v. *Blue Ridge Elec. Co-op Inc.*, 356 U.S. 525; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132 (1963); *Blackhawk Heating & Plumbing* v. *Driver*, 433 F 2d 1137 (1970); *Heirs of Fruge* v. *Blood Service*, 507 F 2d 841 (1975); *Friend* v. *Aetna Finance Co.*, 622 F 2d 1217 (1980).

Without a remand, if the Court of Appeals was correct on its reversal of the petitioner's summary judgment, the petitioner would not have her "day in court".

CONCLUSION

Because of the above facts, authorities and argument, the petitioner prays that this Court review the decision below, which decision was a departure from the accepted and usual course of judicial proceedings.

Respectfully submitted,

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March 1982

Appendix

APPENDIX A

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 81-1591

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

HAZEL JEAN GULLEY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 0889—GEORGE N. LEIGHTON, *Judge*

ARGUED NOVEMBER 3, 1981—DECIDED JANUARY 11, 1982
Before SPRECHER, BAUER, and WOOD, *Circuit Judges.*

SPRECHER, *Circuit Judge.* This appeal arises out of an interpleader action brought by Connecticut General Life Insurance Company to determine which of the defendants, Mary Ann Balsley or Hazel Jean Gulley, is entitled to the proceeds of a life insurance policy. The policy, which was issued by Connecticut General, covered the life of Julious Balsley, husband to Mary Ann Balsley and father to Hazel Jean Gulley. Connecticut General has paid the contested proceeds into the registry of the district court and is not a party to this appeal.

The district court granted Mary Ann Balsley's motion for summary judgment and directed payment of the benefits of the life insurance policy to Mary Ann Balsley.

Hazel Jean Gulley appeals that decision. For the reasons discussed below, we reverse the order of the district court.

I

In May, 1975, Julious Balsley was insured under a group life insurance policy issued to his employer. Initially, Julious Balsley designated his wife, Mary Ann Balsley, and his mother, Ernestine Moreland, now deceased, as the beneficiaries. They continued to be the designated beneficiaries until at least Sunday, March 11, 1979. On that day, Julious Balsley, while of sound mind and in the presence of a witness, executed a Change of Beneficiary form desiguating Hazel Jean Gulley, his daughter, as the new beneficiary. Julious told Hazel that he wanted her to receive the proceeds of the policy in the event of his death, as he had otherwise provided for other family members. He left the form with Hazel, saying that he would return to get it and deliver it to his employer.

During the following week, Julious worked Monday through Friday, but he did not see Hazel nor did he return to get the form. He spoke with her once, on Sunday, March 18, but the insurance policy was not discussed. That evening Julious Balsley suffered a fatal heart attack. Two days later, on March 20, Hazel Jean Gulley mailed a copy of the Change of Beneficiary form to Julious Balsley's employer. None of the parties contend that Julious Balsley authorized Hazel Jean Gulley to send the form, or that he intended that she do so.

The insurance policy provides as follows:

> CHANGE OF BENEFICIARY. A new Beneficiary may be designated from time to time by filing a written request therefor on a form satisfactory to the Insurance Company and signed by the Employee. No change of Beneficiary will take effect until received by the Insurance Company, or by the policyholder if it has been agreed that Beneficiary designa-

> tions be filed with the Policyholder. When, however, the change has been received, whether the Employee is then living or not, it will take effect as of the date of execution of the written request therefor . . .

The parties agree that the Change of Beneficiary form was properly executed by Julious Balsley and was otherwise satisfactory to Connecticut General. Nonetheless, the district court concluded that, since the policy requires filing of a Change of Beneficiary form by the insured or his agent, and no such filing occurred here, Julious Balsley failed to do everything in his power to effect the change of beneficiaries. Absent substantial compliance with the terms of the policy, the court found that no change of beneficiaries had taken place. Thus the only issue on appeal is the effect of Julious Balsley's failure to deliver, or cause to be delivered, the Change of Beneficiary form, or to direct that the form be delivered.

II

The cases dealing with a change of beneficiaries of a life insurance policy fall into two rather obvious categories—those in which the purported change of beneficiary was found to be effective and those in which the change was not effective.[1] In the first category of cases,[2] the

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[1] Connecticut General Life Insurance Company is a Connecticut corporation with its principal place of business in Connecticut. Both Mary Ann Balsley and Hazel Jean Gulley are citizens of Illinois and residents of the Chicago area. It is well settled that, in interpleader actions such as this one, where there is diversity of citizenship, we are obligated to follow Illinois law. *Prudential Ins. Co. of America* v. *Moore*, 145 F.2d 580, 583 (7th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945).

[2] *See, e.g., Continental Assurance Co.* v. *Platke*, 295 F.2d 571 (7th Cir. 1961); *John Hancock Mutual Life Ins. Co.* v. *Douglass*, 156 F.2d 367 (7th Cir. 1946); *Prudential Ins. Co. of America* v. *Moore*, 145 F.2d 580 (7th Cir. 1944), *cert. denied*, 324 U.S. 849 (1945).

insured took a number of positive steps to change the beneficiary, but unusual circumstances prevented strict compliance with the terms of the policy. In such cases, the Illinois rule is that "when an insured has done everything within his power to effectuate a change of beneficiary, equity will not require exact compliance with all stated conditions [of the policy] in order to consider that a change of beneficiary has been effected." *Donahey* v. *Sweigart*, 336 Ill. App. 366, 371, 84 N.E.2d 170, 172 (4th Dist. 1949). Thus if the insured has substantially complied with the terms of the policy, the change of beneficiary will be upheld.

In the second category, of cases,[3] the insured took virtually no steps to abide by the terms of the policy regarding a change of beneficiaries. Typically, the only evidence of an attempted change was an oral statement by the insured that he intended to change the beneficiary of his insurance policy. Although recognizing that strict compliance with the terms of the policy is not essential, the courts have required more concrete evidence of intent in order to effect a change of beneficiary.

The case before us falls between these two categories of cases. Here the insured, Julious Balsley, clearly did not comply with the strict terms of the policy. The policy contemplated that, in order for a change of beneficiary to be effective, the insured would file a Change of Beneficiary form with the employer. Although Hazel Jean Gulley mailed a copy of the Change of Beneficiary form to the employer, she did so on her own initiative and not at the direction of Julious Balsley. Moreover, there were no unusual circumstances that prevented Julious

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[3] *See, e.g., Logan* v. *State Farm Life Ins. Co.*, 61 Ill. App.3d 770, 378 N.E.2d 395 (3d Dist. 1978); *Tatelman* v. *Tatelman*, 25 Ill. App. 3d 678, 323 N.E.2d 821 (1st Dist. 1975); *Williams* v. *Teachers Ins. and Annuity Ass'n*, 15 Ill. App. 3d 542, 304 N.E.2d 656 (1st Dist. 1973); *Donahey* v. *Sweigart*, 336 Ill. App. 366, 84 N.E.2d 170 (4th Dist. 1949).

Balsley from delivering the form to his employer as required by the policy.

On the other hand, Julious Balsley did take a number of positive steps to effect the change of beneficiaries. He obtained the correct Change of Beneficiary form, executed the form properly and in the presence of a witness, explained to his daughter and the witness why the change was being made, and expressed his intent to deliver the form to his employer at a later time. The only further step needed to complete the change of beneficiary would have been for Julious Balsley to deliver the properly executed form to his employer or to direct someone else to deliver it.

We also note that in this case none of the evidence militates against giving effect to the Change of Beneficiary form executed by Julious Balsley. There is no hint of fraud or duress in the execution of the form. There is no indication that the decedent changed his mind during the week between the execution of the form and his death. Moreover, Mr. Balsley's death was sudden and unexpected. Neither of the claimants, nor Julious Balsley himself, appears to have thought the change was made in contemplation of death. Given these circumstances, the decedent's failure to deliver the Change of Beneficiary form to his employer during the week after it was executed is not a strong argument against giving effect to the document.

Although the final step of delivering the Change of Beneficiary form to the employer or directing that it be delivered did not occur, we find that there was substantial compliance with the terms of the insurance policy. This holding conforms to the general rule that " '[w]here insured takes a positive action which evidences his obvious desire for a change of beneficiary, the courts will adopt such construction as will assist in carrying out such intention.' " *John Hancock Mutual Life Insurance Co.* v. *Douglass*, 156 F.2d 367, 369 (7th Cir. 1946) (quot-

ing 2 APPLEMAN, INSURANCE LAW AND PRACTICE § 963 (1941)).

For all of the foregoing reasons, we find that Julious Balsley substantially complied with the terms of his life insurance policy and effectively changed the beneficiary under the policy from his wife, Mary Ann Balsley, to his daughter, Hazel Jean Gulley. We therefore reverse the decision of the district court, and we direct that judgment be entered for Hazel Jean Gulley and that the benefits of the life insurance policy be paid to her.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 9, 1982.

Before

Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*

No. 81-1591

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Plaintiff-Appellee,

vs.

HAZEL JEAN GULLEY,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 80 C 0889

GEORGE N. LEIGHTON, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellee, Mary Ann Balsley, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NOTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 889

CONNECTICUT GENERAL LIFE
INSURANCE COMPANY,

Plaintiff,

vs.

MARY ANN BALSLEY and
HAZEL GULLEY,

Defendants.

Before the Honorable GEORGE N. LEIGHTON,
United States District Judge

Memorandum

Plaintiff Connecticut General Life Insurance Company brought this interpleader action to determine which of the defendants, Mary Ann Balsley or Hazel Gulley, is entitled to the proceeds of a life insurance policy issued by plaintiff and covering Julious Balsley, husband to Mary Ann and father to Hazel Gulley. Plaintiff paid the contested proceeds into the registry of the Court and was discharged from the action except as to its motion for attorney's fees. Hazel Gulley then moved for summary judgment, which motion was denied since, among other reasons, a genuine issue of fact remained concerning the authenticity of the change of beneficiary form designating her as beneficiary. The cause is now before the court on Mary Ann Balsley's motion for summary judgment against Hazel Gulley. There is no material issue concerning the facts; and the relevant ones can be simply stated.

In May, 1975, Julious Balsley was insured under a group insurance policy issued to his employer. Under the predecessor group insurance program, he designated his wife, Mary Ann Balsley, and his mother, Ernistine Moreland, now deceased, as beneficiaries. They continued as beneficiaries under plaintiff's policy. On March 11, 1979, Julious Balsley, while of sound mind and in the presence of a witness, executed a change of beneficiary form designating Hazel Gulley the new beneficiary. He told Hazel Gulley that he wanted her to receive the proceeds of the policy in the event of his death since he had otherwise provided for other family members. He left the form with her, saying that he would return to get it and deliver it to his workplace.

During the week of March 12 to March 16, Balsley worked daily, but did not see Hazel Gulley nor did he return to get the form. He spoke with her once, on March 18, but the insurance policy was not discussed. On the evening of March 18, Julious Balsley suffered a fatal heart attack. Two days later, on March 20, Hazel Gulley mailed a copy of the change of beneficiary form to Julious Balsley's employer. None of the parties contend that Hazel Gulley was authorized by Julious Balsley to send the form, or that he intended that she do so. She mailed it completely on her own initiative.

The insurance policy provides as follows:

> CHANGE OF BENEFICIARY. A new beneficiary may be designated from time to time by filing a written request therefor on a form satisfactory to the Insurance Company and signed by the Employee. No Change of Beneficiary will take effect until received by the Insurance Company, or by the policy holder if it has been agreed that the Beneficiary designations be filed with the Policyholder. When, however, the change has been received, whether the Employee is then living or not, it will take effect as of the date of the execution of the written request therefor . . .

For the purposes of this motion, it is accepted that the form was properly executed by decedent and otherwise satisfactory to the Insurance Company. The only issue concerns the effect of decedent's failure to deliver or cause the form to be delivered himself, or to direct that it be delivered.

In supporting her motion for summary judgment, Mary Ann Balsley relies on the fact that her husband left the form with Gulley, telling her to keep it until he picked it up for delivery, and that he did not tell her to deliver it or return to do so himself during the following week. Mary Ann Balsley argues that these facts indicate that her husband did not intend to change the beneficiary and that Gulley was not authorized by him to send in the form. Gulley argues in opposition that her father intended to change the beneficiary and took positive steps to effectuate his intention. She interprets the policy, which states that the change of beneficiary form may be received after the employee is dead, to imply that the employee or his agent need not file the form.

Generally, a change of beneficiary can only be effectuated as prescribed in the policy. *Williams* v. *Teachers Ins. & Annuity Association*, 15 Ill.App. 3d 542, 304 N.E. 2d 656 (1973). However, when the insured has done everything within his power to effectuate the change of beneficiaries, equity will not require exact compliance with the policy. *Donahey* v. *Sweigart*, 336 Ill. App. 366, 84 N.E.2d 170 (1949); *Logan* v. *State Farm Life Ins. Co.*, 61 Ill. App.3d 770, 378 N.E.2d 395 (1978); *Continental Assurance Co.* v. *Platke*, 295 F.2d 571 (7th Cir. 1961). Also, where the insured takes some positive action which evidences his clear wish to change beneficiaries, the courts will adopt a construction which assists in carrying out his intention, but substantial compliance with the terms of the policy is required. *John Hancock Mutual Life Ins. Co.* v. *Douglass*, 156 F.2d 367 (7th Cir. 1946); *Tatelman* v. *Tatelman*, 25 Ill.App.3d 678, 323 N.E.2d 821 (1975).

The courts have frequently held that where the insured initiates delivery of the change of beneficiary form, either by placing it in the mail or by entrusting it to an agent with directions to deliver it, but the insured dies before the form is actually received by the insurance company, the change of beneficiary is effective, either because the the insured has done everything in his power to effectuate the change, or because the requirement of substantial compliance is satisfied. *See* 2A Appleman, Insurance Law and Practice §1021 (1966); Annot., 78 A.L.R.3d 466 (1977). The policy language on which Gulley relies, giving effect to a form *received* after the employee is dead, reflects and refers to these cases, and cannot tenably be construed to allow a change of beneficiary form to be filed by an unauthorized third party. Especially in the absence of a clear intent to change the beneficiary, the court could not so distort the language of the policy to allow the construction advanced by Gulley. Accordingly, since the policy requires filing by the insured or his agent, and no such filing occurred here, the insured simply failed to substantially comply with the terms of the policy.

It also cannot be reasonably maintained that the insured did everything in his power to effectuate the change of beneficiaries. He was completely functional and attending to his regular business for a full week after filling out the form, but failed to retrieve and deliver it or direct that it be delivered. It cannot be determined whether he did not recognize the urgency or whether his intent was wavering, but it would not matter. This is clearly not a case where the insured had done everything possible, but the policy is not complied with due to circumstances beyond his control. *See, e.g.,; Prudential Insurance Co.* v. *Moore,* 145 F.2d 580 (7th Cir. 1944), *cert, den.* 324 U.S. 849 (1945) (insurer failed to complete ministerial acts); *Mitchell* v. *Mitchell,* 126 Ga.App. 664, 191 S.E.2d 587 (1972) (insured's hospitalization may have

prevented him from delivering forms); *Continental Assurance Co.* v. *Platke,* 295 F.2d 571 (7th Cir. 1961) (insured could not get access to the policy itself); *Kit* v. *Stecker,* 109 F.2d 281 (3rd Cir. 1940) (insured reasonably misunderstood the requirements). In the circumstances of this case, the insured, though able to comply with the terms of the policy, simply did not do so. *See, e.g., Donahey* v. *Sweigart,* 336 Ill.App. 366, 84 N.E.2d 170 (1949); 2A Appleman, *supra*; 78 ALR3d 466, *supra.*

Since a reasonable factfinder could not conclude that the insured had done everything in his power to comply with the terms of the policy, and it is undisputed that he did not substantially comply therewith, there are no genuine issues of material fact. Accordingly, Mary Ann Balsley's motion for summary judgment is hereby granted.

So ordered,

/s/ George N. Leighton,
United States *District Judge*

Dated: Feb. 6, 1981

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 889

CONNECTICUT GENERAL LIFE
INSURANCE COMPANY,

Plaintiff,

vs.

MARY ANN BALSLEY and
HAZEL GULLEY,

Defendants.

Before the Honorable GEORGE N. LEIGHTON,
United States *District Judge*

Judgment

This cause has been heard on the motion of defendant Mary Ann Balsley for summary judgment in her favor and against defendant Hazel Gulley, pursuant to Rule 56 (a), Fed. R. Civ. P.; and the court has considered the pleadings, affidavits, deposition testimony and briefs of both defendants, has issued its memorandum setting forth its findings of fact and conclusions of law, and has granted Balsley's motion for summary judgment.

Further, the court has considered the motion of the plaintiff, Connecticut General Life Insurance Company for attorney's fees and the expenses of filing this interpleader action. The motion for fees is supported by an affidavit and brief. Defendant Gulley has answered Connecticut General Life's motion and has opposed its grant. Defendant Balsley has raised no objection to the grant

of plaintiff's motion. After due consideration, the court concludes that Keck, Mahin and Cate, attorneys for plaintiff Connecticut General Life Insurance Company, are entitled to the sum petitioned for, $1,950, said sum being reasonable and in accordance with statute and rules. Defendant Mary Ann Balsley does not object to this court's ruling that the petition for fees and costs of suit should be granted.

Now, it is therefore ordered, adjudged and decreed that:

Judgment is entered in favor of plaintiff Mary Ann Balsley and against defendant Hazel Gulley as to the right to the proceeds of the insurance policy alleged and described in plaintiff's complaint.

That the clerk of this court pay to Keck, Mahin and Cate, as and for attorney's fees and costs of suit the sum of $1,950 from the policy proceeds previously deposited with the clerk pursuant to the order of this court.

The balance of the funds on deposit with the clerk of this court be and the same is awarded to defendant Mary Ann Balsley, and the clerk is ordered to pay that sum to her.

So ordered,

/s/ George N. Leighton,
United States District Judge

Dated: Mar. 12, 1981

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 889

CONNECTICUT GENERAL LIFE INSURANCE COMPANY,

Plaintiff,

vs.

MARY ANN BALSLEY and HAZEL GULLEY,

Defendants,

Before the Honorable GEORGE N. LEIGHTON
United States District Judge

Memorandum

This interpleader action is before the court on defendant Hazel Gulley's (hereinafter referred to as "Gulley") motion for summary judgment, and plaintiff Connecticut General Life Insurance Company's (hereinafter referred to as "Connecticut General") motion for costs and attorneys' fees. For the following reasons, defendant Gulley's motion is denied. Because this court finds that plaintiff Connecticut General's motion for costs and fees is premature, ruling on it is reserved pending disposition of this action.

In order to appreciate the present posture of this case, it is necessary to consider the facts involved. Plaintiff Connecticut General is a corporation organized under the laws of the state of Connecticut, and it has its principal place of business in that state. Defendant Mary Ann

Balsley is a citizen of the state of Illinois, as is defendant Gulley. Jurisdiction is predicated upon diversity of citizenship in accordance with 28 U.S.C. §1332, and venue is proper pursuant to 28 U.S.C. §1391(a).

On May 1, 1975, plaintiff issued a policy of group insurance No. 0410970-1 to Avis Rent A Car System, Inc., and the life of Julious Balsley, an Avis employee, was insured under that policy for $17,000.00. Mr. Balsley designated his wife, defendant Mary Ann Balsley, as beneficiary with his mother, Ernestine Moreland under a predecessor group life insurance program, and those beneficiaries were considered to be the beneficiaries under the Connecticut General policy at and after its effective date. Plaintiff alleges that Ernestine Moreland died on September 1, 1973, leaving defendant Balsley as the sole surviving beneficiary, and that Julius Balsley died on March 18, 1979.

Soon after Julious Balsley's death, plaintiff Connecticut General received a copy of a letter sent to Avis by defendant Gulley, a copy of which is attached to plaintiff's complaint as Exhibit "C". The letter claimed that Julious Balsley executed a change of beneficiary form one week before his death which allegedly substituted defendant Gulley, who represented herself to be Julious Balsley's daughter, for defendant Balsley. A copy of the alleged change of beneficiary form is attached to plaintiff's complaint as Exhibit "D".

Plaintiff alleges that the alleged change of beneficiary form had never been submitted to plaintiff nor to Avis before Julious Balsley's death, that it was dated one week before his death, that the form was one provided by a predecessor group life insurer, and that the form was signed by a witness whom plaintiff has been unable to locate. Attached as Exhibit "E" to plaintiff's complaint is a copy of a letter indicating that defendant Balsley would contest payment of the insurance proceeds to any person other than herself. Thereafter, plaintiff filed this interpleader action.

By order dated September 25, 1980, this court directed Connecticut General to pay into the Registry of this court the sum of $17,000.00, and noted that neither defendant objected to this deposit. Accordingly, it was ordered that Connecticut General be discharged from any and all liability on Policy No. 0410970-1 covering the life of Julious Balsley. Neither defendant objected to this discharge. Jurisdiction was retained with respect to Connecticut General for the purpose of ruling on its motion for costs and fees.

Defendant Gulley has moved for summary judgment in her favor and against defendant Balsley pursuant to Rule 56, Fed. R. Civ. P. In support thereof, she argues that there is no genuine issue as to any material fact and that she is entitled to judgment as a matter of law. Defendant Balsley has answered, stating that a genuine issue as to the authenticity of the change of beneficiary form allegedly executed by Julious Balsley exists, and that defendant Gulley's motion should therefore be denied. This court finds that a genuine issue as to the authenticity of the change of beneficiary form exists.

At the outset, this court notes that summary judgment is a procedure to be applied with caution. *Peoples Outfitting Co.* v. *General Elec. Credit Corp., Inc.*, 549 F.2d 42, 45 (7th Cir. 1977). The granting of summary judgment is never warranted except on a clear showing that no genuine issue as to any material fact remains for trial. *Id.*

In *Tomalewski* v. *State Farm Life Insurance Company*, 494 F.2d 882 (3rd Cir. 1974), an interpleader action, the mother and wife of the deceased insured both claimed the proceeds of a life insurance policy. The facts giving rise to the controversy as to who was designated beneficiary involved a reversed sheet of carbon paper used to fill in copies of the insurance application. There, the Third Circuit reversed entry of summary judgment because a genuine issue of material fact existed with respect to whether the deceased had made a gift of the policy to

her during his lifetime, as she had averred. *See Companion Life Ins. Co.* v. *Schaffer,* 1442 F.Supp. 826 (S.D. N.Y. 1977), where summary judgment was denied in an interpleader action brought to resolve a controversy between claimants concerning their rights to the proceeds of a life insurance policy issued by the plaintiff, and the beneficiary designation portion of the application had been altered.

In this case, it is clear that supporting affidavits are insufficient to satisfy the burden imposed on the movant to establish first, that no material issues of fact remain, and second, that she is entitled to a ruling in her favor *Butler* v. *Bensinger,* 377 F.Supp. 870, 874 (N.D. Ill. 1974). Therefore, defendant Gulley's motion for summary judgment must be and the same hereby is denied.

As stated above, plaintiff Connecticut General has moved for allowance of costs and attorneys' fees. In support, it cites *Lincoln Home Life Ins. Co.* v. *Harrison,* 71 F.R.D. 27 (E.D. Okl. 1976), where the court awarded the stakeholder attorneys' fees. A detailed memorandum regarding the services rendered and hours spent was filed. However, plaintiff fails to note that in *Lincoln Home* a settlement had been reached and the only issue to be determined was the reasonableness of the attorneys' fees sought by the stakeholder.

In light of the posture of this case, this court is of the opinion that plaintiff's motion for costs and fees is premature. Therefore, ruling on this motion is reserved pending disposition of the above-entitled cause.

So ordered,

/s/ George N. Leighton,
United States District Judge

Dated: Nov. 14, 1980